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Departure from the Guidelines: The Frolic and Detour of the Circuits—How the Circuit Courts are Undermining the Purposes of the Federal Sentencing Guidelines

John Frazier Jackson*

I. Introduction

The question of the constitutionality of the Federal Sentencing Guidelines¹ is now settled.² Courts are currently faced with questions concerning the standard of review that will be used to determine if a district judge's departure, either upward or downward, from a recommended Guideline was warranted and if so, whether the departure was "reasonable."³ This author contends that the circuits are in

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1. Promulgated pursuant to the Sentencing Reform Act of 1984, 18 U.S.C. § 3551-3581 (1988). Throughout the text of this Article they will be referred to as the "Guidelines."

The Guidelines have only been in place since November 1987 and existing literature written about them is scarce. Most articles deal with either the mechanics or constitutionality of the Guidelines. See Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); Schwender, *Sentencing Guidelines for Court Martial: Some Arguments Against Adoption*, 20-50-188 ARMY LAW. 33 (1988); Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181 (1988); Comment, *Structuring Determinate Sentencing Guidelines: Difficult Choices for the New Federal Sentencing Commission*, 35 CATH. U.L. REV. 181 (1985). See also Clarke, *Federal Sentencing Guidelines Update*, THE CHAMPION Aug. 1988, at 16-18.

2. *Mistretta v. United States*, 109 S. Ct. 647 (1989).

3. 18 U.S.C.A. § 3742 (West 1988 & Supp. 1989). This section provides, in part:

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;
(2) was imposed as a result of an incorrect application of the sentencing guidelines;
(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sen-

disagreement regarding the proper standard of review to be applied in analyzing departures, and have failed to develop any uniform system of application. This Article discusses how several of those circuits are reviewing departures,⁴ specifically in the latitude of discretion they are allowing district judges. The Article is not designed to exhaust the rulings of the circuits⁵ but to describe patterns that are emerging, and to propose that if the intention of the Commission⁶ and the integrity of the Guidelines is to be maintained, a uniform workable standard of review should be developed. The most pressing question raised, however, is who is empowered to develop such a

tencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and disposition—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determined that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

4. The courts have dealt with two different kinds of departures: those under Guideline Section 4a—Criminal History Category Departures—and those under section 5K—Offense Level Departures. At the writing of this Article, the majority of the decisions dealing with departures has been in the area of offense level departures. This Article's focus is primarily on those section 5K departures, leaving the others to another work.

5. When this Article was first circulated for possible publication, there were approximately 10 cases in the various circuits dealing with departures. Almost every case dealt with offense level departures and all but one was an upward departure. During the stage of final drafting before printing, there have been over 40 cases on departures decided within the months of November and December, 1989. After a review of these cases, I have included several that are pertinent. I have also noted that the pattern of behavior by the courts of appeals has not changed, but continues to obscure the intentions of the Commission and thwart the goal of uniformity in sentencing.

6. Congress sought to achieve three main objectives through the creation of the Commission. The objectives represent the fundamental purposes of the Commission: (1) to strengthen the justice system and reduce crime by providing fair, just sentencing; (2) uniformity through proportionality; and (3) honesty in sentencing. See U.S. Sentencing Commission, *Sentencing Guidelines and Policy Statements*, Apr. 13, 1987, at 1.2 [hereinafter *Sentencing Guidelines*].

standard, since the United States Supreme Court seems reluctant to hear the cases.

II. Determining a Guideline Range

The first step in developing a Guideline range is determining an individual's criminal history category and offense level. By placing these two numbers on a chart that lists the applicable ranges, the Guideline range is determined.⁷

A. Offense Level

The offense level is controlled by Chapter 2, "Offense Conduct,"⁸ and Chapter 3 parts A, B, and C of the Guidelines.⁹ The Guidelines establish a framework for determining the offense level. The following example illustrates a typical determination of an offense level:

EXAMPLE:

X, a 34-year old drug dealer and user, robs a bank and manages to get \$40,000. During the hold-up, he used a semi-automatic weapon and grabbed a teller, placing the weapon to her head using her as a shield until he could get out of the building. Investigations discovered that part of the proceeds were used to buy a shipment of drugs. When caught, *X* pleads guilty and agrees to testify truthfully, which he does during debriefings.

X's record is: (1) *X* served eighteen months in prison on a burglary conviction at age 22; and (2) he served three months on a drunk driving charge at age 25.

(a) Section 2B3.1(a) provides that robbery carries a base offense level of 18.¹⁰

(b) Section 2B3.1(b)(1) then adjusts this level by the amount of money involved. For \$40,000, the adjustment would be two levels, for a total offense level of 20.¹¹

(c) Section 2B3.1(b)(2) then increases the level by four levels for use of a firearm, thereby increasing the offense level to 24.¹²

(d) Section 2B3.1(b)(3) can further adjust for injury but not

7. *Sentencing Guidelines*, *supra* note 6, at 5.2.

8. *Id.* at 2.1-2.120.

9. *Id.* at 3.1-3.5.

10. *Id.* at 2.17.

11. *Id.*

12. *Sentencing Guidelines*, *supra* note 6, at 2.17.

more than nine points for both (2) and (3).¹³ In our fact pattern, there is no adjustment, and the total remains at 24.

(e) Section 2B3.1(b)(4) allows for a four-point enlargement for the abduction of the teller,¹⁴ creating a new total of 28.

(f) Section 3A1.3 contains adjustments that allow for a two-point enhancement if the victim was restrained.¹⁵ Here it is not applicable since it was already considered in the offense characteristics.¹⁶

(g) Section 3E1.1 provides for a two-point reduction for acceptance of responsibility,¹⁷ bringing X's total to 26.

Thus, after all of the offense level, victim-related, and acceptance of responsibility adjustments have been made, the adjusted offense level is 26.

B. Criminal History Category

Chapter 4 of the Guidelines sets forth the procedure for determining an individual's Criminal History Category. This is done by totalling the points that are provided for in section 4A1.1.¹⁸ In our hypothetical, X, the defendant, gets three points for the imprisonment, and two more for the drunk driving charge, for a total of five points.¹⁹ According to the Sentencing Table, five points is a Criminal History Category of III.²⁰ When a Criminal History Category III is matched with an offense level of 26, the Guideline range is between seventy-eight and ninety-seven months.²¹

III. Departure from the Guidelines

A. Statutory Basis for Departure

The guideline range suggested in a presentence investigation report does not bind a sentencing judge to that range. A judge may choose to depart if there are mitigating or aggravating factors not adequately considered by the applicable guideline.²² If no guideline

13. *Id.*

14. *Id.* at 2.18.

15. *Id.* at 3.1.

16. The commentaries to § 3A1.3 suggest that an enhancement for victim restraint is not applicable if the conduct was already considered in another section. *Id.* at 3.2. Section 2B3.1(b)(4) added four points for kidnapping. See *supra* note 14 and accompanying text.

17. *Sentencing Guidelines, supra* note 6, at 3.12.

18. *Id.* at 4.1.

19. *Id.*

20. *Id.* at 5.2.

21. See *id.* at 5.2 (chart).

22. 18 U.S.C. § 3553(b) (1988) provides in part that a court may depart if it finds that

exists for the offense, a judge should then sentence giving "due regard" for the Guidelines applicable to similar offenders and offenses.²³

If a sentencing judge departs from a guideline, a right of appeal exists for the U.S. Attorney if the departure is downward²⁴ or for the defendant if the departure is upward.²⁵ If an appeal is taken based on a departure, the statute provides that the standard of review is one of reasonableness, and deference should be given to the sentencing judge unless the court of appeals finds the judge's departure to be "clearly erroneous."²⁶

B. Guideline Basis for Departure²⁷

Section 5K of the Guidelines deals with grounds for departure. Section 5K2.0²⁸ contains a policy statement covering the grounds for

"an aggravating or mitigating circumstance exists that was not adequately taken into consideration . . . and that should result in a sentence different from that described." See also 18 U.S.C.A. §§ 3552, 3553(d) (West Supp. 1989).

23. 18 U.S.C. § 3553(b) (1988).

24. *Id.* § 3742(b).

25. *Id.* § 3742(a).

26. *Id.* § 3742(d)(3).

27. See generally Weintraub, *Federal Sentencing Guidelines: Creative Departures, Negotiating Pleas, and Litigating Sentences*, (pts. 1 & 2) THE CHAMPION May 1989, at 7-11, June 1989, at 23-28.

28.

§5K2.0. General Provisions (Policy Statement)

Under 18 U.S.C. §3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (e.g., as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction. Thus, disruption of a governmental function, § 5K2.7, would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a governmental function, departure from the

departure and generally urges a sentencing court to depart only when the guidelines do not adequately consider the nature of aggravating or mitigating circumstances that exist in a particular case.²⁹ The court has discretion, according to the policy statement, but the frequent exercise of that discretion is not encouraged apart from an adequate consideration of factors that amount to "unusual circumstances."³⁰

Guideline sections 5K2.1 through 5K2.14 list examples of reasons for departure.³¹ These are only examples, however, and are neither exhaustive nor exclusive. Section 5K2.0 allows flexibility when dealing with both guideline factors and departure factors.³²

C. Commentaries on Departure

In 1987, the Sentencing Commission disseminated commentaries, the *Sentencing Guidelines and Policy Statements*.³³ Included in the commentaries were a dissenting view of the Guidelines by Paul H. Robinson³⁴ and comments on that dissent.³⁵ The commentaries

applicable guideline more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the offense of conviction is robbery because the robbery guideline includes a specific sentence adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in §1B1.3.

Sentencing Guidelines, *supra* note 6, at 5.30-5.31.

29. *Id.* at 5.30.

30. These are circumstances that are "substantially in excess" of what is normally involved in such a case. *See id.* at 5.30 (§ 5K2.0).

31. The reasons listed along with their Guideline subsection are as follows: 2.1 death; 2.2 physical injury; 2.3 extreme psychological injury; 2.4 abduction or unlawful restraint; 2.5 property damage or loss; 2.6 weapons and dangerous instrumentalities; 2.7 disruption of governmental function; 2.8 extreme conduct; 2.9 criminal purpose; 2.10 victims conduct; 2.11 lesser harms; 2.12 coercion and duress; 2.13 diminished capacity; 2.14 public welfare. *Id.* at 5.31-5.35 (§§ 5K2.1-5K2.14).

32. *Sentencing Guidelines*, *supra* note 6, at 5.30.

33. *See Sentencing Guidelines*, *supra* note 6.

34. *Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission*, May 1, 1987, in *Sentencing Guidelines*, *supra* note 6. Commissioner Robinson cited many reasons for his view of the failure of the Commission resulting primarily from what he called "a lack of serious and informed deliberation and analysis." Among those faults he, almost prophetically, stated that:

were designed to interpret the Guidelines and assist the judiciary, federal probation officers, U.S. Attorneys, and defense counsel in applying them to individual sentences.³⁶

The commentator's position is that departure is permitted but not expected to happen in the normal course of sentencing. The Guidelines adequately consider many mitigating or aggravating factors, and courts are expected to follow them. Only factors not "adequately taken into consideration by the Sentencing Commission"³⁷ are grounds for departure. According to the Commission, the Guidelines were designed to allow the courts to depart for good reason, but the Guidelines presuppose that this will happen infrequently.

The Commission has adopted this departure policy for two basic reasons. First is the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that in the initial set of guidelines it need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create

The guidelines include so many invitations and directions to depart from the guidelines, in even commonplace cases, that the "guidelines" are little more than non-binding recommendations that are not likely to reduce disparity. Indeed, because the Parole Commission will no longer be adjusting the disparate sentences imposed by judges—as it does now, albeit in an inadequate way—it is very possible that unwarranted disparity will increase under these guidelines.

For a summary of Commissioner Robinson's comments, see *Summary of Dissent*, at 2, in *Sentencing Guidelines*, *supra* note 6. [Editor's Note: Although it may seem to be an anomaly, Commissioner Robinson's dissenting statement—dated May 1, 1987—does appear in the Commission's *Sentencing Guidelines and Policy Statements*—dated April 13, 1987.]

35. *Preliminary Observations of the Commission on Commissioner Robinson's Dissent*, May 1, 1987, in *Sentencing Guidelines*, *supra* note 6.

36. The Commission's 1988 update on the Guidelines contains the following statement on the significance of the Commentary to the Guidelines:

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. See 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

U.S. Sentencing Commission, *Guidelines Manual*, at 1.22 (§ 1B1.7) (West 1988) (incorporating Guideline amendments effective June 15, 1988) [hereinafter *1988 Guidelines Manual*].

37. *Sentencing Guidelines*, *supra* note 6, at 5.30 (§ 5K2.0).

more accurate guidelines that specify precisely where departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time.³⁸

A careful review of the Guidelines, the policies underlying the statutes, and the commentaries reveals the following:

1. When formulating the Guidelines, the Commission considered a wide variety of circumstances that have occurred in the past and that might occur in the future. These typical circumstances form the "heartland"³⁹ referred to in the Guidelines.

2. Courts are given the freedom to depart from a Guideline specified sentence by exercising their discretion.⁴⁰

3. Although this freedom to depart does exist, it should be used only in cases when the factors considered significantly exceed those adequately taken into account by the Commission.⁴¹ Unusual and atypical situations allow for departure.⁴²

4. When a judge departs from the Guidelines, the departure will be reviewed for its reasonableness and will be reversed only if clearly erroneous.⁴³

IV. Appellate Review of Departures from the Guidelines

Among other things, Congress designated the Commission to create a sentencing system that would foster uniformity throughout the courts of appeal. Congress realized that this goal could be reached only if courts apply the Guidelines in similar fashion, interpreting the language of the commentaries similarly, striving to reach a consensus on the appropriate situations for departure from recommended guidelines.

38. 1988 *Guidelines Manual*, *supra* note 36, at 1.7.

39. *Id.* at 1.6.

40. *See id.*

41. 18 U.S.C.A. § 3553(b) (West 1985 & Supp. 1988). This statutory section provides:
The court shall impose a sentence of the kind and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

42. 1988 *Guidelines Manual*, *supra* note 36, at 1.6, 1.8.

43. *Id.* at 1.1 (Part A—Introduction and General Application Principles); 18 U.S.C. § 3742(e)(4) (1988).

Trial court decisions have reached the courts of appeals in several circuits, and patterns in the decisions are now emerging. These patterns are not uniform: at the least they are diverse, and more likely are in conflict with each other. Some courts of appeal are allowing wide discretion, some are allowing no discretion, and others are attempting to develop workable tests.

A. Wide Discretion and the Second Circuit

Two of the early cases on departure, *United States v. Correa-Vargas*⁴⁴ and *United States v. Guerrero*,⁴⁵ are from the Second Circuit. In these cases the court established a standard of review that allowed sentencing judges to exercise wide discretion in choosing when to depart from a recommended sentence.⁴⁶ Close analysis of these cases reveals that "wide discretion" may mean unbridled discretion, in that this discretion gives a sentencing judge almost unlimited opportunity for departure. The integrity of the Guidelines thus becomes a secondary consideration.

In *Correa-Vargas*, the defendant was charged in a two-count indictment with conspiracy to distribute⁴⁷ and possession of cocaine,⁴⁸ but ultimately pled to a superceding information⁴⁹ for using a communication facility,⁵⁰ a charge that carries a maximum prison term of forty-eight months.⁵¹ The applicable guideline in the case recommended a sentence of from six to twelve months.⁵²

Relying on the amount of cocaine involved as an aggravating circumstance, the judge departed from the Guidelines and sentenced the defendant to the maximum statutory term.⁵³ The issue on appeal was whether the judge used an impermissible factor in deciding to

44. 860 F.2d 35 (2d Cir. 1988).

45. 863 F.2d 245 (2d Cir. 1988).

46. See *id.* at 251; *United States v. Correa-Vargas*, 860 F.2d 35, 39-40 (2d Cir. 1988).

47. 18 U.S.C. § 371 (1966); 21 U.S.C. § 841(a)(1) (1982).

48. 21 U.S.C. § 841(a)(2) (1982).

49. An individual may execute a valid waiver of indictment on any crime not punishable by death and, upon agreement, a defendant can enter into a plea bargain and choose to proceed by information. There is no essential difference between an information and an indictment. They are both, except for the signature, precisely in the same form, serve the same purpose, and have the same consequence. See FED. R. CRIM. P. 7; *Hamling v. United States*, 418 U.S. 87 (1974); *Bartlett v. United States*, 354 F.2d 745 (8th Cir.), *cert. denied*, 384 U.S. 945 (1966); *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

50. 21 U.S.C. § 843(b) (1982).

51. *United States v. Correa-Vargas*, 860 F.2d 35, 36 (2d Cir. 1988).

52. *Correa-Vargas* accepted responsibility for the crime and received a two-point reduction (§ 2D1.6), giving him a base offense level of 10, which coupled with a criminal history category of I resulted in the guideline range. See *id.* at 36 n.1.

53. *Id.* at 36.

depart.⁵⁴ Quantity is not an aggravating factor in section 2D1.6,⁵⁵ the Guideline section used to arrive at the offense level.

The Second Circuit upheld the judge's departure and cited language in the Guideline commentaries⁵⁶ that seems to indicate that departure can be based on factors that are not included in the Guidelines.⁵⁷ The Second Circuit concluded, "Consistent with this approach, there is no place in the Guidelines where the Commission states that it has rejected quantity as a factor in sentencing telephone-count offenders."⁵⁸ The court then stated that "the most applicable policy statement in the guidelines also gives a district court *wide discretion* in determining which circumstances to take into account in departing from the guidelines."⁵⁹

Upon closer examination, the policy statement of section 5K2.0, to which the court referred, provides that "[t]he controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing."⁶⁰ As the discussion below will demonstrate, however, this quote is taken out of a larger context. Other pertinent parts of the Commission's policy statement confirm that the commissioners did not intend to allow wide discretion as the Second Circuit defines that concept.⁶¹

In *Correa-Vargas*, the court essentially ignored the Guideline directives of departing for "unusual circumstances,"⁶² "not very

54. *Id.*

55. Section 2D1.6 contains no adjustments and provides no commentary that relates any offense characteristic to the process of arriving at a base offense level. *Sentencing Guidelines*, *supra* note 6, at 2.40. Compare that to § 2D1.5, which has three potential base offense levels that are dependent on the substance possessed, *id.* at 2.43, and § 2D1.1, in which the base offense level depends on the quantity of drugs that were possessed. *Id.* at 2.32-2.38.

56. The language cited from § 5K2.0 of the commentaries is as follows:

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Sentencing Guidelines, *supra* note 6, at 5.30-5.31.

57. *United States v. Correa-Vargas*, 860 F.2d 35, 37-38 (2d Cir. 1988).

58. *Id.* at 37.

59. *Id.* (emphasis added).

60. *Sentencing Guidelines*, *supra* note 6, at 5.30-5.31 (§ 5K2.0—General Provisions (Policy Statement)).

61. This court seems to ignore the Commission's emphasis on helping judges to identify both factors not "fully" considered and "unusual circumstance." It is clear from the larger context of this section that Commission consideration of any factors must be inadequate to warrant departures. *Sentencing Guidelines*, *supra* note 6, at 5.36, 5.37 (§ 5K2.0—Grounds for Departure (Policy Statement)).

62. *Sentencing Guidelines*, *supra* note 6, at 5.30-5.31 (§ 5K2.0—General Provisions (Policy Statement)).

often,"⁶³ and only when the factors substantially outweigh those factors already considered by the Commission.⁶⁴ The Second Circuit's approach is that if the Commission wishes to preclude departure in any given area, it will limit the discretion. The court's approach seems to assume that any factor not specifically addressed in the commentaries may be used by a judge in exercising his or her "sound judgment"⁶⁵ and "sensible flexibility."⁶⁶

In December of 1988, the same court was faced with another upward departure case in *United States v. Guerrero*.⁶⁷ In *Guerrero*, the indictment charged the defendant with two counts of conspiracy to distribute over 100 grams of heroin, and, in a third count, with distributing an unspecified amount of a Schedule I Narcotic, which also turned out to be heroin.⁶⁸ Pursuant to a plea agreement, Guerrero pled guilty to the third count with no agreement in the bargain regarding the ultimate sentence.⁶⁹ There was an agreement with the prosecutor, however, that the defendant should receive a two-point reduction in his offense level for remorse,⁷⁰ and a two-point reduction for minor participation in the crime.⁷¹

The government and the defendant stipulated to the facts that would be used by the court and the probation department for Guideline calculation and sentencing:

The stipulation disclosed that Guerrero had held a series of conversations with the informant in which arrangements were made to have Guerrero introduce the informant to a potential supplier of heroin and to have the informant pick up from Guerrero a sample of heroin furnished by the supplier. Guerrero also acknowledged that he knew the informant intended to buy an additional quantity of heroin from the supplier. Finally, Guerrero admitted that he introduced Rivera to the informant on December 9 and remained present during a conversation in which the informant and Rivera negotiated a sale of heroin. The sale,

63. *Id.* at 1.6 (Chapter one, Part A(4)(b) on departures).

64. *Id.* at 5.30-5.31 (§ 5K2.0—General Provisions (Policy Statement)).

65. *United States v. Correa-Vargas*, 860 F.2d 35, 40 (2d Cir. 1988).

66. *Id.*

67. 863 F.2d 245 (2d Cir. 1988).

68. *Id.* at 246.

69. *Id.*

70. Section 3E1.1(A) of the Guidelines, which deals with acceptance of responsibility, provides as follows: "If the defendant clearly demonstrates a recognition and affirmation of acceptance of responsibility for his criminal conduct, reduce the offense level by 2 levels." *Sentencing Guidelines*, *supra* note 6, at 3.12.

71. Section 3B1.2(a) of the Guidelines provides: "If the defendant was a minor participant in any criminal activity, decrease [the offense level] by 2 levels." *Sentencing Guidelines*, *supra* note 6, at 3.3.

made on December 11, involved 698 grams of heroin.⁷²

Even with these stipulated facts and the agreement regarding point reductions during sentencing, there was an argument regarding the appropriate base offense level. The defendant contended that since he had only been convicted of one sale of a three-gram sample, the appropriate base offense level was 12, according to section 2D1.1.⁷³ An additional two-point discount for acceptance of responsibility⁷⁴ would make the defendant's base offense level a 10.⁷⁵ An offense level 10 coupled with a criminal history category of I results in a six to twelve month guideline range.⁷⁶

The prosecution and probation officers, however, urged the court to calculate the base offense level based upon the overall quantity of heroin involved, 698 grams.⁷⁷ This would be a level 28,⁷⁸ and with the four-point reduction promised, would create a guideline range of fifty-one to sixty-three months.⁷⁹

The lower court judge accepted the defendant's version, but departed upward, sentencing the defendant to sixty-five months and a \$200,000 fine.⁸⁰ The Second Circuit stated that the sentencing judge should have used a base offense level of 28 with a four-point reduction.⁸¹

The court, citing *Correa-Vargas*, concluded that the upward departure was reasonable, especially since the sentencing judge chose the lower guidelines.⁸² The court of appeals indicated that if the sentencing judge had applied a higher Guideline range, it might have been unreasonable to consider the quantity of the subsequent sale as a reason for departure.⁸³

The court's use of drug quantity as a factor in determining the

72. *United States v. Guerrero*, 863 F.2d 245, 246 (2d Cir. 1988). The sample was three grams. *Id.* at 247.

73. Section 2D1.1. of the Guidelines provides that if the amount of drugs involved is less than five grams of heroin, the offense level is 12. *Sentencing Guidelines*, *supra* note 6, at 2.39; see *United States v. Guerrero*, 863 F.2d 245, 246 (2d Cir. 1988).

74. *Sentencing Guidelines*, *supra* note 6, at 3.12 (§ 3E1.1(a)).

75. Defendant forfeited an additional two-point reduction since he pled guilty only to the count involving three grams. *Id.* at 5.2 (Chapter 5, Part A (Sentencing Table)); see *Guerrero*, 863 F.2d at 247.

76. *Guerrero*, 863 F.2d at 246-47.

77. *United States v. Guerrero*, 863 F.2d 245, 247 (2d Cir. 1988).

78. Four hundred to 699 grams of heroin is an offense level of 28. *Sentencing Guidelines*, *supra* note 6, at 2.38 (§ 2D1.1); see *Guerrero*, 863 F.2d at 247.

79. *Guerrero*, 863 F.2d at 247.

80. *Id.*

81. *Id.* at 250.

82. *United States v. Guerrero*, 863 F.2d 245, 250 (2d Cir. 1988).

83. *Id.* at 250-51.

reasonableness of departure was not necessarily flawed just because the Guidelines had already considered quantity in setting the offense level. Clearly, scores may be adjusted based upon the unusual gravity of the offense,⁸⁴ and the excess amount in this case was considered. Rather, the problem with the Second Circuit's approach is that there was no analysis of whether the aggravating or mitigating circumstances were significantly in excess of those considered by the Commission, or if the circumstances were unusual or atypical. As it had in *Correa-Vargas*, the court of appeals in *Guerrero* simply deferred to the sentencing court's ultimate judgment and paid only lip service to the Guidelines.

The Second Circuit continued to promulgate this wide discretion standard in *United States v. Sturgis*.⁸⁵ The defendant in this case was charged with committing two bank robberies.⁸⁶ The probation department recommended a departure upward from the Guidelines due to an inadequate criminal history category⁸⁷ that did not consider two important factors. First, the defendant previously pled guilty to two state felonies, but had never been sentenced.⁸⁸ Second, the defendant had committed these two bank robberies while on bail awaiting sentencing for the two prior felonies.⁸⁹ Based upon those factors, the district court gave the defendant a criminal history Category V and sentenced him to sixty months in prison.⁹⁰

The court of appeals' analysis of this departure relied heavily upon the wide discretion standard from *Correa-Vargas* and *Guer-*

84. See *supra* notes 30-31 and accompanying text.

85. 869 F.2d 54 (2d Cir. 1989).

86. *Id.* at 55.

87. Section 4A1.3 of the Guidelines provides: "If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range." *Sentencing Guidelines*, *supra* note 6, at 4.6.

88. *United States v. Sturgis*, 869 F.2d 54, 55 (2d Cir. 1989).

89. *Id.* at 55-56. Section 4A1.3(d) of the Guidelines provides:

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning: . . . (d) whether the defendant was pending trial, sentencing, or appeal on another charge at the time of the instant offense.

Sentencing Guidelines, *supra* note 6, at 4.7 (§ 4A1.3: Adequacy of Criminal History Category (Policy Statement)).

90. *Sturgis*, 869 F.2d at 56. The sentence is within the Category V range (57-71 months), but is outside the Category III range (37-46 months). See *Sentencing Guidelines*, *supra* note 6, at 5.2.

rero.⁹¹ The court also repeatedly cited 28 U.S.C. § 991(b)(1)(B), stating that the purpose of the Guidelines is to avoid "unwarranted sentencing disparity"⁹² among similarly situated defendants. This statement indicates that the court disapproves of unwarranted departures. At the same time, however, the court contended that each judge must exercise his or her own sound judgment and may do so with discretion.⁹³

Although this departure may be an example of a justified deviation from the recommended Guideline, the court upheld it without adequate consideration of the Guideline commentaries or meaningful analysis as to how this defendant's criminal history category "significantly underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes."⁹⁴ This approach was used by the Second Circuit in each of the three cases noted above and provides almost unlimited departure possibilities.

It is interesting to note that in *United States v. Paulino*⁹⁵ the Second Circuit used a different standard when analyzing whether or not a judge could or should depart downward. In *Paulino*, the court articulated a standard not in terms of wide discretion, but in terms of Guideline considerations.⁹⁶ Compare the following with the former notions of wide discretion and sound judgment:

The decision to depart is a matter within the sound discretion of the sentencing judge. See Sentencing Guidelines ch. 5, pt. K, § 2 General Provisions (Policy Statement), at p. 5.30 ("The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing."); *United States v. Correa-Vargas*, 860 F.2d 35, 40 (2d Cir. 1988); see also *United States v. Sturgis*, 869 F.2d 54, 56 (2d Cir. 1989). Moreover, Congress expected that that broad discretion would be exercised only when the basis for departure was a circumstance not already factored into the Guidelines: "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines

91. *Sturgis*, 869 F.2d at 56-57.

92. *Id.* at 56-57. See also 28 U.S.C. § 991(b)(1)(B) (Supp. 1987).

93. *United States v. Sturgis*, 869 F.2d 54, 57 (2d Cir. 1989).

94. *Sentencing Guidelines*, *supra* note 6, at 4.7 (§ 4A1.3(e)).

95. 873 F.2d 23 (2d Cir. 1989).

96. *Id.* at 25.

. . . .” 18 U.S.C.A. § 3553(b) (West Supp. 1988). Here, Paulino suggests as bases for departure two factors, minimal role and insubstantial criminal record, both of which were explicitly considered by the Commission in formulating the Guidelines and were taken into account by the District Court in its guideline calculation. Under such circumstances, a decision not to depart from the applicable guideline range cannot possibly be in excess of the discretion confided in sentencing judges⁹⁷

In light of past Second Circuit cases, sound judgment and wide discretion again seem to mean that the judge is autonomous unless the Guidelines expressly and specifically forbid departure. The court’s reference to the integrity of the Guidelines is quite meaningless considering the latitude it allows, and its reference to “broad discretion”⁹⁸ is incongruous considering how the court defined and applied “wide discretion.”⁹⁹

Appellate courts use this wide discretion standard when reviewing a lower court’s decision on evidentiary rulings under Rule 403 of the Federal Rules of Evidence.¹⁰⁰ In such cases, appellate courts have given great deference to lower courts, and will only reverse a ruling when there is an abuse of discretion.¹⁰¹

In departure cases, however, the Second Circuit has given wide discretion to lower courts who only must be reasonable under the Guideline standard. The primary difference is that a judge making an evidentiary ruling has seen and heard the presentation and is charged with making a ruling. In contrast, when a judge sets a sentence outside recommended Guidelines, he or she is not the sole determinor of the applicable criteria—the Commission’s determinations also must be considered. The reason the standard is mere reasonableness, therefore, is because the Guidelines, unlike the rules of evidence, afford very little latitude in decisionmaking. It is inappropriate, therefore, to give the same latitude of discretion for both evidentiary rulings and departure decisions. Broad discretion as defined in the Guideline commentaries hardly resembles the Second Circuit standard.

Most recently the Second Circuit decided *United States v. Coe*,¹⁰² in which the court reversed and remanded based on improper

97. *Id.*

98. *Id.*

99. *Id.*

100. FED. R. EVID. 403.

101. *See, e.g., Block v. R.H. Macy & Co.*, 712 F.2d 1241 (8th Cir. 1983).

102. 891 F.2d 405 (2d Cir. 1989).

departure from both the criminal history category and the offense level.¹⁰³ The lower court gave three reasons for the departure: (1) a pattern of robberies, specifically the short amount of time between the robberies; (2) the defendant's representation to bank personnel that he had a gun when in fact he did not; and (3) the need to protect society from a continuation of the previous pattern of behavior of the defendant.¹⁰⁴

The court of appeals—in detail foreign to its decisions in *Guerrero* and *Correa-Vargas*—analyzed each stated reason for departure, giving great deference to the Guideline considerations.¹⁰⁵ The court even went so far as to conjecture what evidence the commissioners must have considered when formulating certain Guidelines.¹⁰⁶ In each case the conclusion was that the Commission had already adequately considered the factor the lower court used to depart.¹⁰⁷

The most interesting feature of the opinion, however, is what it omitted. There is no reference to *Guerrero*, *Correa-Vargas*, or wide discretion anywhere in the consideration of departing from the offense level. The court based its determination solely upon Guideline policy and Commission commentaries. This strikingly different approach demonstrates this circuit's lack of concern for proper Guideline implementation and suggests an intra-circuit conflict.

B. Broad Discretion and the Fifth Circuit

The Fifth Circuit grappled with the departure issue in *United States v. Roberson*.¹⁰⁸ Eddie Wayne Roberson was indicted for credit card fraud.¹⁰⁹ Since the facts giving rise to this charge were not typical of those involved in similar cases, it is worthwhile to present them in some detail.

While he was on parole, Roberson met and befriended an eighty-year old alcoholic, Jack Doherty.¹¹⁰ Roberson lived with Doherty, who gave him room and board in exchange for assisting the elderly man with his household duties, taking him to the doctor, and doing the shopping.¹¹¹ One night when Doherty was drunk, he had a coughing fit and became unconscious after he fell and struck his

103. *Id.* at 404-14.

104. *Id.* at 408.

105. *Id.* at 408-14.

106. *Id.* at 410-12.

107. *United States v. Coe*, 891 F.2d 405, 410-12 (2d Cir. 1989).

108. 872 F.2d 597 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989).

109. *Id.* at 598.

110. *Id.* at 599.

111. *Id.*

head on a table.¹¹² Unable to detect a pulse or breathing, Roberson immediately fled the scene, fearing accusations of murder.¹¹³ He returned home later and found Doherty dead.¹¹⁴ He wrapped Doherty up in a quilt and cleaned the house in order to conceal the incident. Roberson then placed the body in the back of Doherty's car, and drove around Texas for several days with the body in the car.¹¹⁵ Eventually, Roberson burned the body beyond recognition.¹¹⁶ During his travels, he used Doherty's credit cards to buy food and gas and to rent rooms.¹¹⁷ He also flew to Kansas city on the card and later returned to Texas. Roberson spent approximately \$6700 on the credit card.¹¹⁸

The state was never able to charge Roberson with more than abuse of a corpse, a charge on which he had not been tried at the time of the federal indictment on charges of credit card fraud.¹¹⁹ During the sentencing phase, the court was presented with a Guideline range of thirty to thirty-seven months, based upon an offense level of 12 and a criminal history category of VI.¹²⁰ The judge chose to depart and imposed a sentence of 120 months. The court relied on extreme conduct as a justification for departure, citing section 5K2.8 of the Guidelines.¹²¹

The Fifth Circuit analysis, as well as the sentencing court's reasoning, involved a diligent search of the Guidelines. The court found extreme circumstances beyond those contemplated by the Guidelines and found the departure reasonable.¹²²

One issue that arose was the defendant's insistence that a section 5K2.8 departure is only to be considered when the extreme offense conduct against the victim relates to the charges in the indictment.¹²³ In other words, when the conduct against the victim is not

112. *Id.*

113. *United States v. Roberson*, 872 F.2d 597, 599 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *United States v. Roberson*, 872 F.2d 597, 599 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989).

119. *Id.* at 599-600.

120. *Id.* at 600.

121. The court stated that "Roberson's conduct is the type of 'extreme conduct' justifying departure from the Guidelines . . . § 5K2.8 provides that the court may depart from the guidelines if the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim." *Id.* at 602.

122. *See supra* note 121.

123. *United States v. Roberson*, 872 F.2d 597, 603 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989).

involved in the offense charged, section 5K2.8 does not apply. The court concluded that such an interpretation is too narrow and would preclude statutory maximum sentencing.¹²⁴

This issue is closely related to discretion, and the Fifth Circuit indicated that the sentencing court has broad discretion. The *Roberson* court's definition of "broad" is the same as the Guidelines' definition of that term, and the court went to great lengths to adhere to the Guideline definition of the term.¹²⁵ Quite unlike the Second Circuit's analysis, the Fifth Circuit's use of "broad" included the principle that "Congress limited the resources which the district court may use to determine whether the Commission has given adequate consideration to a factor, instructing that a sentencing court shall consider only the guidelines, the policy statements, and the official commentary of the Commission."¹²⁶

C. Tests from the First and Sixth Circuits

The First Circuit developed a three part test in *United States v. Diaz-Villafane*.¹²⁷

We have yet to limit the standards of review applicable to departures from the Guidelines. We do so today. The process, as we see it, comprises three steps.

First, we assay the circumstances relied on by the district court in determining the case is sufficiently "unusual" to warrant departure. That review is essentially plenary: whether or not circumstances are of a kind or degree that they may appropriately be relied upon to justify departure is, we think, a question of law.

Second, we determine whether the circumstances, if conceptually proper, actually exist in the particular case. That assessment involves factfinding and the trier's determinations may be set aside only for clear error. See 18 U.S.C. § 3742(d).

Third, once we have assured ourselves that the sentencing court considered circumstances appropriate to the departure equation and that those factors enjoyed adequate record support, the direction and degree of departure must, on appeal, be measured by a standard of reasonableness. 18 U.S.C. § 3742(e)(2)

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124. *Id.* at 605-06.

125. *Id.* at 604-05.

126. *Id.* at 602. As discussed below, the Sixth Circuit has adopted a similar notion of broad discretion at least in name, but without the underpinnings of the Commission commentaries and policy statements. See *infra* notes 131-51 and accompanying text.

127. 874 F.2d 43 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989). It is interesting to note that one of the three judges on the opinion was a member of the Sentencing Commission.

128. *Id.* at 49.

The third prong of this test is really nothing more than a re-statement of 18 U.S.C. § 3742, which contains the reasonableness standard. Later in the opinion, however, the court attempted to clarify the meaning of the third part of the test:

This third step involves what is quintessentially a judgment call. District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier's superior "feel" for the case. We will not lightly disturb decisions to depart or not, or related decisions implicating degrees of departure.¹²⁹

Although the court never explained steps one and two, it is not difficult to understand what the First Circuit did. The court rewrote the statutes, Guidelines, and policy statements into a test. But will it work?

For example, the court considered the first part of the test to contain a question of law.¹³⁰ In contrast, the Guidelines' policy statements make that decision a factual matter to be determined by the sentencing judge.¹³¹ The sentencing court is to look for the atypical, the unusual, and factors that are significantly different from those already considered by the applicable Guidelines. Such a consideration will always involve the judgment call of the factfinder. As a legal matter, these standards are settled. From a factual standpoint, however, they must be decided in each case.

The second part of the *Diaz-Villafane* test, like part one, questioned whether the factors under consideration depart from the heartland¹³² carved out by the Commission. After analyzing this test one is left with the same questions the test attempts to answer: when is a departure warranted, and what departures are reasonable? The court's attempt to transform a factual finding into a legal standard does nothing more than restate the Guidelines. In effect, part two contains no test at all.

The Sixth Circuit adopted a similar approach in *United States*

129. *Id.* at 49-50.

130. See text accompanying *supra* note 128.

131. *Sentencing Guidelines*, *supra* note 6, at 5.30-5.31 (§ 5K20—Grounds for Departure (Policy Statement)).

132. *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989).

v. Rodriguez,¹³³ relying on the First Circuit's test in *Diaz-Vilafane*¹³⁴ and *United States v. Velasquez-Mercado*.¹³⁵ In applying this test, the *Rodriguez* court upheld the sentencing judge's reliance (1) upon a foreign conviction;¹³⁶ (2) upon a finding that the defendant had the propensity to commit crimes in the future;¹³⁷ and (3) upon a finding that the defendant had survived through criminal activity since entering the United States.¹³⁸ Based on these factors, the Sixth Circuit concluded that the sentence was not unreasonable. Additionally, the court noted that sentencing courts have broad discretion as defined by the Fifth Circuit in *United States v. Roberson*¹³⁹ and the Sixth Circuit in *United States v. Sailes*.¹⁴⁰ The broad discretion standard as defined in *Roberson*, however, is not inconsistent with maintaining uniformity and considering the factors already considered by the Guidelines. In *Roberson*, the Fifth Circuit noted that the Guidelines circumscribe a court's discretion but do not eliminate it.¹⁴¹ According to Fifth Circuit, the court's discretion is broad, but broad is defined in terms of the Commission's policy:

The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds an aggravating or mitigating circumstance that was not adequately taken into consideration by the Sentencing Commission. . . . 18 U.S.C. § 3553(b). Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.¹⁴²

133. 882 F.2d 1059 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1144 (1990).

134. 874 F.2d 43 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989).

135. 872 F.2d 632 (5th Cir.), *cert. denied*, 110 S. Ct. 187 (1989).

136. *United States v. Rodriguez*, 882 F.2d 1059, 1067 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1144 (1990).

137. *Id.* at 1067-68.

138. *Id.* at 1068.

139. 872 F.2d 597, 601 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989).

140. 872 F.2d 735, 739 (6th Cir. 1989).

141. *Roberson*, 872 F.2d at 601.

142. *Id.* at 601 (quoting *Guidelines*, *supra* note 6, at 1.5 (Resolution of Major Issues)); *see also Guidelines*, *supra* note 6, at 5.30 (§ 5K2.0—General Provisions (Policy Statement)).

This language is important since the Sixth Circuit in *Rodriguez* cited both *Roberson* and the Second Circuit's *Correa-Vargas* as support for its method of departure.¹⁴³ The problem is that the Fifth Circuit's broad discretion is Guideline-based, while the Second Circuit's wide discretion seems to bear no resemblance to either the Guideline policies or the Fifth Circuit's definition of broad discretion. The result, at least in the Sixth Circuit, is a three-part test ostensibly based upon the Guidelines, coupled with a form of discretion described as broad, but possibly wide depending on which circuit's definition they ultimately accept.

After adopting the First Circuit's test in *Rodriguez*, the Sixth Circuit returned to that test in *United States v. Joan*.¹⁴⁴ The court made reference to broad discretion and deferred to the trial judge's ultimate familiarity with all the "nuances of the case."¹⁴⁵ There was a twist, however.

After applying the test to determine if a departure was warranted and reasonable, the court added its own seven-part analysis to determine reasonableness.¹⁴⁶ The opinion indicates that the court will apply the three-part test along with broad discretion (whatever this means to the Sixth Circuit) to determine if there are grounds for departure and if it is reasonable.¹⁴⁷ Then, to determine reasonableness, the court will look at seven "guides":¹⁴⁸ (1) the seriousness of the defendant's past criminal conduct; (2) likelihood of recidivism; (3) prior similar adult conduct that did not result in criminal conviction; (4) previous lighter or lenient sentences; (5) what deterrent effect the sentence will have on future criminal conduct; (6) the necessity of isolating the defendant from the community; and (7) the length of time needed to achieve rehabilitation.¹⁴⁹

Several questions arise from this confusing decision. First, it is unclear what test the court will apply in subsequent cases: a three-part test? a seven-part test? or a ten-part, two-step test? Second, in determining the reasonableness of a departure, what is the appropriate measure of discretion: broad discretion? wide discretion? or some variant of these terms? Finally, what does the Sixth Circuit's test say that the Guidelines and the commentaries haven't already said?

143. *United States v. Rodriguez*, 882 F.2d 1059, 1068 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1144 (1990).

144. 883 F.2d 491 (6th Cir. 1989).

145. *Id.* at 495-96.

146. *Id.* at 496.

147. *Id.* at 495.

148. *Id.* at 496. The court does not refer to these seven items as factors.

149. *United States v. Joan*, 883 F.2d 491, 496 (6th Cir. 1989).

Upon review of the Sixth Circuit's seven-part test and the First Circuit's three-part test, the author believes that an essential problem with both of these tests is that they are merely reiterations of the Guideline policies and commentaries. For example, items one and two of the seven-part analysis deal with past imprisonment and recurrences of criminal conduct.¹⁵⁰ Chapter four of the Guidelines, Part A,¹⁵¹ deals with criminal history. Specifically, section 4A1.1(a) adds points to a calculation of criminal history for all prior imprisonments of more than one year and one month.¹⁵² Section 4A1.1 also accounts for misdemeanor imprisonments, miscellaneous imprisonments, and offenses committed while on probation or parole, supervised release, imprisonment, work release or escape status.¹⁵³ In addition, recidivist behavior is accounted for by adding points for offenses committed less than two years after release from imprisonment.¹⁵⁴

The commentary to Part A shows that the Guidelines adequately consider likelihood of rehabilitation and recidivism:

Introductory Commentary

The Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. § 3553(a)(2).) A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.

The specific factors included in § 4A1.1 and § 4A1.3 are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior. While empirical research has shown that other factors are correlated highly with the likelihood of recidivism, *e.g.*, age and drug abuse, for policy reasons they were not included here at this time. The Commission has made no definitive judgment as to the reliability of the existing data. However, the Commission

150. See text accompanying *supra* note 149.

151. *Sentencing Guidelines*, *supra* note 6, at 4.1-4.8.

152. *Id.* at 4.1.

153. *Id.*

154. *Id.*

will review additional data insofar as they become available in the future.¹⁵⁵

Certainly, there may be cases when the Guidelines do not accurately reflect conduct. Nevertheless, section 4B1.1-1.3 takes into account career offenders as well as criminal livelihood offenders.¹⁵⁶ A seven-part analysis is not necessary since sentencing judges need only determine whether or not the Guidelines adequately considered the factors involved and, if so, whether these factors were substantially in excess of the Guideline treatment of them. This can be accomplished by deferring to and discussing the commentaries and policy statements.

D. Analysis from the Third Circuit

The Third Circuit's analysis of the departure issue comes closest to reflecting the intentions of the Commission,¹⁵⁷ and gives the greatest recognition to those factors already incorporated into the Guidelines. In *United States v. Uca*,¹⁵⁸ the court of appeals reversed a lower court for impermissibly departing in the sentences of two defendants.¹⁵⁹

The defendants were charged with conspiracy to commit federal firearms offenses.¹⁶⁰ One defendant, Hodzic, had imported fifty-six untraceable firearms into the Philadelphia area and intended to transport them out of the United States.¹⁶¹ The other defendant, Uca, was involved in the attempted sale of the fifty-six firearms.¹⁶²

The Guidelines calculated by the probation department called for a range of between six to twelve months for Hodzic and two to eight months for Uca.¹⁶³ However, based on the number of firearms and its conclusion that "the conspiracy posed threats to community safety and welfare," the probation department recommended much stiffer sentences.¹⁶⁴ The court sentenced Hodzic to thirty months im-

155. *Id.*

156. *Sentencing Guidelines*, *supra* note 6, at 4.9.

157. It appears from a case decided as recently as January 2, 1990, that the Fourth Circuit's analysis of departures takes a similar approach to the Third Circuit by avoiding tests and wide discretions and focusing primarily on the Guidelines and their commentaries. See *United States v. Summers*, 893 F.2d 63 (4th Cir. 1990).

158. 867 F.2d 783 (3d Cir. 1989).

159. *Id.* at 784.

160. *Id.* at 785.

161. *Id.*

162. *Id.*

163. *United States v. Uca*, 867 F.2d 783, 785 (3d Cir. 1989).

164. *Id.* The probation department recommended that Hodzic receive 24 months imprisonment, three years supervised release, and \$5000 in fines and that Uca receive 18 months in

prisonment, three years supervised release, and \$2250 in fines and assessment, and Uca to the recommended sentence.¹⁶⁵ The lower court cited the number of weapons and their inability to be traced as reasons for its departure.¹⁶⁶

The Third Circuit's response was to interpret the court's departure power in terms of limited discretion, especially when the Guidelines adequately consider the offense factors that the court used as justification for departure.¹⁶⁷ The court recognized the Commission's stated intentions that departure should be rare.¹⁶⁸ This reasoning is important because it is consistent with the stated intentions of Con-

prison, three years of supervised release, and \$1050 in fines. *Id.*

165. *Id.*

166. *Id.* at 786. The lower court's discussion of its reasons for departure is set forth below:

The statutory maximum sentence on count 1 is five years' imprisonment. The guideline range is 6 to 12 months. I am departing from the guideline range and imposing a sentence of 30 months. Mr. Hodzic's offense and Mr. Hodzic possessing 56 untraceable handguns poses a serious threat to the public safety and welfare of the community. There's no lawful purpose for these guns. We're not talking about one gun or two guns we're talking about 56 untraceable handguns which translates in my mind to at least 56 potential acts of violence in this country or another country. The use of handguns, unlicensed handguns, causes the perpetuation of criminal activity of persons so inclined to rob, maim, start their own private wars, even drug wars in cities such as Philadelphia.

I also find it difficult to understand why the defendants would not have had some purpose in mind for these 56 weapons that could be articulated here today.

I'm departing from the guidelines upwards because of the threat posed to the community by the defendant. As best I can surmise, and taking the evidence in the light most favorable to the defendant, he was involved in the attempted sale of 56 handguns to an Albanian for overseas use, an illegal use which would have required transport outside of the country.

On the other hand, according to the defendant there was no clear purpose, which translates into an undefined purpose which means that these untraceable guns had a market value in this country or elsewhere precisely because they were untraceable.

United States v. Uca, 867 F.2d 783, 786 (3d Cir. 1989) (footnote omitted). In response to a question by Uca's counsel, the sentencing court elaborated:

I do not find that the guidelines are adequate to address an issue of intended sale of handguns for an overseas war, small or large. I do not find the guidelines speak to the characteristic of guns being untraceable. I do not find the guidelines speak to the characteristics of the offense, including handguns—well, that are not traceable.

It is the quality of that offense which prompts me to depart from the guidelines. The guidelines are guidelines, I exercise my discretion in departing from them and for the reasons given.

Id.

167. "[W]hen the applicable guidelines, specific offense characteristics and adjustments do take into consideration a factor listed . . . , departure from the guideline is warranted *only* if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction." *Id.* (emphasis added). See also, *Sentencing Guidelines*, *supra* note 6, at 5.35-5.40 (Chapter 5, Part K).

168. *United States v. Uca*, 867 F.2d 783, 787 (3d Cir. 1989).

gress to impose uniformity of sentencing for similar actions throughout the country.¹⁶⁹ In order to accomplish this goal of uniformity, it is necessary to limit departure. As the Third Circuit recognized, "These attempts to impose uniformity will be destroyed if courts often depart from the Guidelines."¹⁷⁰

Accordingly, the Third Circuit's review concentrated on the guideline factors¹⁷¹ and whether those factors had already adequately considered the conduct cited by the sentencing judge as justification for departure.¹⁷² The bulk of the discussion in *Uca* was an analysis of each factor the lower court used to depart and the relationship of those factors to the applicable Guidelines. When the Guideline covers the conduct in question the analysis is complete: any departure is unwarranted and would be considered unreasonable. Departure is appropriate in only two situations: when a case involves characteristics not covered by the Guidelines, or when the characteristics in the case, although considered by the Guidelines, are substantially in excess of the usual case.

The Third Circuit's approach to interpreting the guidelines is the most sensible considering the stated intention of the Commission. Although departures will be rare under this approach, they will still be possible. Broad discretion, wide discretion, or some other test or standard is not necessary to allow for departure. The Third Circuit's approach is one example of how a court may depart within the bounds of the Guideline commentaries and policy statements.

In another Third Circuit case, *United States v. Ryan*,¹⁷³ the defendant was charged with one count of possession with intent to distribute crack cocaine¹⁷⁴ to which he pled not guilty and went to trial.¹⁷⁵ The jury acquitted him of that charge but found him guilty of the lesser included offense of simple possession.¹⁷⁶

During trial, evidence was adduced that while the defendant was being apprehended, he dropped a brown paper bag that was later retrieved and found to contain thirty-three plastic bags each with between .2 and .4 grams of crack cocaine, totalling 10.32

169. See *supra* note 6.

170. *Uca*, 867 F.2d at 787.

171. "Thus, in exercising our review function on the question of whether the Commission adequately took certain factors in consideration, this court should respect the overriding congressional purpose of reducing sentencing disparity and achieving general uniformity of treatment." *Id.*

172. See *United States v. Uca*, 867 F.2d 783, 787-90 (3d Cir. 1989).

173. 866 F.2d 604 (3d Cir. 1989).

174. 21 U.S.C. § 841(a)(1) (1982).

175. *Ryan*, 866 F.2d at 605.

176. *Id.* The statute for possession is 21 U.S.C. § 844(a) (1982).

grams.¹⁷⁷ The purity of the crack was ninety percent by weight.¹⁷⁸ One of the officers testified that based upon his experience in drug enforcement, the possession of such a large number of packets indicated that the crack was not for personal use but was for sale.¹⁷⁹

The presentence report calculated a Guideline range of between zero and six months.¹⁸⁰ The judge, however, chose to depart and sentenced the defendant to ten months in prison, one year supervised release, and \$525 in fines.¹⁸¹ The sentencing court based its departure on the amount of drugs (more than ten grams), the purity, and the packaging, factors that the court felt were not addressed in the Guidelines.¹⁸² On appeal, the defendant argued that the Commission chose not to use quantity as a factor in cases of simple possession, in contrast to the offenses of possession with intent to distribute or trafficking, in which the base offense levels do depend upon quantity.¹⁸³ A similar argument was made regarding the purity of the drug.¹⁸⁴

The Third Circuit analyzed the sentencing court's decision in the same way it did in *Uca*, but reached the conclusion that departure was warranted.¹⁸⁵ The court's analysis was detailed and relied heavily on the original Commission commentaries as well as updates that deal with the exact subject of this case:

The Government further notes that in its first "update" on guideline issues, dated May 5, 1988, the Commission addressed the following inquiry: "[i]f the offender is indicted for possession with intent to distribute, but is only convicted of simple possession, does the amount of drugs affect the sentence?" The Commission responded:

The guideline section utilized to compute the guideline range must be determined by the offense of conviction (§ 1B1.2(a)). The simple possession guideline (§2D2.1) does not utilize the amount of drugs to determine the appropriate offense level. *Of course, the amount of drugs may be considered by the court for the purposes of determining the appropriate sentence within the guideline range and/or possible departure.*¹⁸⁶

177. *United States v. Ryan*, 866 F.2d 604, 605 (3d Cir. 1989).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *United States v. Ryan*, 866 F.2d 604, 605 (3d Cir. 1989).

183. *Id.* at 606.

184. *Id.* The Guidelines do note that unusually high purity may be a reason for upward departure, but this is not in the possession section. *Sentencing Guidelines*, *supra* note 6, at 2.33 (§ 2D1.1 (Commentary)).

185. *Ryan*, 866 F.2d at 610.

186. *Id.* at 608 n.8.

The court also noted that Congress' recent recognition of crack cocaine as a dangerous drug¹⁸⁷ made this case unusual, especially because of the quantity and purity of the drugs.¹⁸⁸ The crux of the analysis and the reliance upon the commentaries and Commission's judgment are evident from the final paragraph of the opinion.

Exercising plenary review, we have determined that a departure is legally permissible because the Commission did not take into account the aggravating circumstances in this case. Beyond that determination, we still must decide whether the given departure was reasonable. That involves at least two sub-issues: whether the factors relied on are appropriate; and whether the degree of departure was appropriate. We conclude, in light of the general language in the guidelines indicating that if departure is authorized, the district courts are entitled to exercise a substantial amount of discretion in determining whether to depart from the guidelines; the more specific language suggesting that particular factors relied on by the district court in this case may well have been viewed by the Commission as warranting departure; and the failure of the Commission to preclude departure on the grounds here relied upon, that the district court's departure from the guidelines in this case was not unreasonable. We will, therefore, affirm.¹⁸⁹

The Third Circuit's reliance on the Commission's judgment is significant, especially in light of the minimal consideration given to these policies by the other circuits. The Guidelines, as written, allow for flexibility on their own terms. A court need not go outside those terms to find reasons to act.

V. Problems in Deciding Departure Issues

The patterns of analysis that have been discussed suggest conflict among the circuits, conflict that would usually provide ample reason for the United States Supreme Court to grant certiorari for resolution. As of the writing of this Article, however, the Court had three opportunities to examine these cases and denied certiorari in all three.¹⁹⁰

187. This was done when Congress recently amended 21 U.S.C. § 844(a) to penalize possession of crack cocaine.

188. *United States v. Ryan*, 866 F.2d 604, 609 (3d Cir. 1989).

189. *Id.* at 610.

190. *United States v. Diaz-Villafane*, 874 F.2d 43 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989); *United States v. Velasquez-Mercado*, 872 F.2d 632 (5th Cir.), *cert. denied*, 110 S. Ct. 187 (1989); *United States v. Roberson*, 872 F.2d 597 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989).

In addition, the court recently denied certiorari in a fourth departure case, *United States v. Taylor*.¹⁹¹ In that case, however, Justice Stevens challenged the Fifth Circuit for their failure to identify an inter-circuit conflict on the question of departures that could have been resolved.¹⁹² His opinion, though not altogether clear on the issue, seems to signal a willingness to act should the right case arise:

Because the petition does not identify any inter-Circuit conflict concerning the question presented, and because the answer provided by the Fifth Circuit's published opinion is widely supported, the Court's denial of certiorari today is entirely consistent with rules governing the management of our certiorari docket. It is unfortunate that the summary disposition of petitioner's case by the Fifth Circuit and this Court may require petitioner to serve an 18-month prison sentence when the Guidelines would specify a range between only 9 and 15 months even if petitioner's criminal history category were increased two full levels. That, however, is the kind of burden that the individual litigant must occasionally bear when efficient management is permitted to displace the careful administration of justice in each case. Perhaps it is not too late for the Court of Appeals to exercise additional care in the administration of justice in this case.¹⁹³

It is not clear why the Court has refused to hear the cases. There are, however, several problems that the Court would face in deciding departure issues. Several of these problems are discussed below.

A. *Who Decides?*

One fundamental question is who is to decide which standard best suits the intention of the Commissioners and maintains the integrity of the Guidelines, its accompanying commentaries, and policy statements. Presumably, the Supreme Court has jurisdiction since these cases are from lower federal courts¹⁹⁴ and deal with federal

191. 873 F.2d 295 (5th Cir.)(Table), *cert. denied*, 110 S. Ct. 265, *withdrawn*, 889 F.2d 272 (5th Cir. 1989) (vacating district court opinion). If the withdrawal of this opinion means anything, this author believes it may mean that either this circuit or other circuits who are internally in conflict over Guideline interpretation may consider certifying those conflicts. Certainly Justice Stevens has given a signal that there is some desire on the Court's part to review the right case. Perhaps the careful exercise of judicial administration in the Fifth Circuit will mean that *Taylor* will soon be before the Court.

192. 110 S. Ct. at 265 (Stevens, J., dissenting from denial of certiorari).

193. *Id.* at 265-66.

194. See U.S. CONST. art. III, § B; see also 23 U.S.C. § 1254 (1966).

legislation. That answer may be deceptively simple, however, since the Commission is a continuing, independent body still extant.¹⁹⁵ Its members serve for designated terms and are obligated to periodically review and revise the Guidelines.¹⁹⁶ Since it operates under the judicial branch, the Commission has a somewhat judicial function. Any new amendments or revisions, however, must be reported to Congress¹⁹⁷ and Congress must be given a yearly analysis of the Guideline operations.¹⁹⁸

It is also the Commission's task to monitor the performance of probation officers and judicial and probation personnel,¹⁹⁹ as well as perform other functions necessary to assist courts in meeting their responsibilities.²⁰⁰ It is unclear whether these functions include altering commentaries and policy statements to correct the inconsistencies among the circuits. If this is part of the Commission's role, are the alterations it makes binding on litigants and the courts? An additional question is whether the Supreme Court must or should allow the Commission an opportunity to correct problems with the Guidelines before the Court takes a case for decision.²⁰¹ If the Supreme Court decided an issue contrary to written commentaries or policies (if indeed it can), could the Commission overrule the Court by clarifying, changing, or promulgating a new Guideline, similar to Congress' power to overrule a Supreme court precedent by legislation?

If the monitoring,²⁰² no matter how burdensome, is carried out and the intention of the Commission is defeated and if disparities in sentencing continue, who acts, the Commission or the courts? The majority opinion in *Mistretta v. United States*²⁰³ seems to answer this by indicating that the Commission has no authority to exercise judicial power.²⁰⁴ If this is so, one must question the propriety of the

195. 28 U.S.C. § 991(a) (Supp. 1987).

196. *Id.* § 994(o). The Commission has recently made revisions to correct or clarify the operation of the Guidelines. See *supra* notes 36, 38.

197. 28 U.S.C. § 994(p) (Supp. 1987).

198. *Id.* § 994(w).

199. *Id.* § 995(a)(9).

200. *Id.* § 995(a)(22).

201. Put another way, is there a heretofore unknown administrative remedy that litigants must exhaust or wait for it to be exhausted by its own process before they can avail themselves of the jurisdiction of the Supreme Court?

202. "We note, in passing, that the monitoring function is not without its burden. Every year, with respect to each of more than 40,000 sentences, the federal courts must forward, and the Commission must review, the presentence report, the guideline worksheets, the tribunal's sentencing statement, and any written plea agreement." *Mistretta v. United States*, 109 S. Ct. 647, 653 (1989).

203. 109 S. Ct. 647 (1989).

204. Regarding the Commission's location with the structure of the federal government the Court noted:

Commission's commentaries being controlling in courts' interpretation of the Guidelines. Finally (and we've come full circle), it is unclear what happens when an appeals court interprets the Guidelines too liberally or too restrictively. Perhaps Justice Scalia's assessment in *Mistretta* is correct: "[H]ere we have an anomaly beyond equal: an independent agency exercising governmental power on behalf of a Branch where all governmental power is supposed to be exercised personally by the judges of courts."²⁰⁵

B. *Are New Rights Created?*

Since the Commission has the authority to set a sentence and, except in all but the most atypical and substantially aggravating cases, mandate what Guideline is to be followed,²⁰⁶ does this create a standard by which we can now measure when a sentence involves the eighth amendment? In other words, can a court now analyze whether a sentence is cruel and unusual by using the Guidelines? Since the basic idea of the prohibition against cruel and unusual punishment is proportionality²⁰⁷ in light of the crime, do the Guidelines now set a standard for review of that question? If a sentence far exceeds the Guideline, can it be unconstitutional as well as unreasonable?

VI. Conclusion

In order to achieve the Guidelines' purpose of attaining truthfulness and uniformity in sentencing, the Commission's intention must indeed be upheld. It is apparent that some circuits are not upholding the intentions of the Commission. This author believes that disparity in sentences may be the result.²⁰⁸ If all the circuits analyzed departure issues as the Third Circuit has, there would be minimal problems. Unfortunately, this is not the current trend.

The Sentencing Commission unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power. Rather, the Commission is an "independent" body comprised of seven voting members including at least three federal judges, entrusted by Congress with the primary task of promulgating sentencing guidelines. 28 U.S.C. § 991(a).

Id. at 661.

205. *Mistretta*, 109 S. Ct. at 682 (Scalia, J., dissenting) (footnote omitted).

206. See *supra* notes 39-42 and accompanying text.

207. See *Rummell v. Estelle*, 445 U.S. 263, 271 (1980).

208. This author predicts that if and when statistical studies are released, they will show that the uniformity of sentencing goal has been realized by application of the Guidelines. However, this author believes that uniformity will be thwarted by the divergent methodologies now employed in interpreting the Guidelines.

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The cases decided in several circuits, however, indicate that the Guidelines may be useful to predict sentencing only when a judge wants them to be. In other words, without a reasonable, workable method by which to determine when and how much to depart (especially upward), courts will frequently depart from the Guidelines, and by substantial amounts. But should the independent agency or the courts solve the problem? The Congress and the Commission should act quickly to answer such questions. Ultimately, the Supreme Court may need to accept certiorari in an appropriate case to provide guidance after *Mistretta*.

